IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 554-555.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Appellants*

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., *Appellees.*

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF MUTUAL BROADCASTING SYSTEM, INC., APPELLEE.

LOUIS G. CALDWELL,
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February 3, 1943.

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INTRODUCTORY.

The opinion below, jurisdiction of the Court, questions presented, statutes involved, and statement of the case are sufficiently set forth in the Government's brief and need not be repeated by us.

We agree in general with the arguments advanced in the Government's brief with respect to the issues presented on these appeals. These questions are as follows:

1. Whether the Federal Communications Commission (hereinafter referred to as the Commission) has power under the Communications Act of 1934, 47 U. S. C. A., Secs. 151 *et seq.*, to promulgate the regulations in issue.

2. Whether the Communications Act of 1934, as construed by the Commission, or Regulations 3.101 to 3.108, inclusive, contravene Article I, Section 1 of the Constitution of the United States or the Fifth Amendment to the Constitution.

3. Whether the three judge statutory court from which these appeals are taken should have dismissed the complaints without holding a trial.

4. Whether the regulations of the Commission are arbitrary and capricious.

The discussion of these questions in the brief for the Government, we believe, adequately disposes of the contentions urged upon this Court by the appellants. However, as we have had over eight years experience in the operation of one of the four nationwide broadcasting networks in the United States and are one of the parties in interest vitally affected by the regulations of the Commission, we feel that we can be of most assistance to the Court if we discuss only the last question, namely, whether the regulations are arbitrary and capricious.

THE REGULATIONS OF THE COMMISSION ARE NOT ARBITRARY AND CAPRICIOUS.

1. Description of Mutual Broadcasting System, Inc.

Mutual Broadcasting System, Inc. (referred to hereinafter as Mutual) had its inception in the fall of 1934, at which time the two existing national network companies (National Broadcasting Co., Inc. and Columbia Broadcast-

ing System, Inc., referred to as National and Columbia, respectively), operating three different network systems[1], had already established themselves and been in business for approximately eight years.

Starting with a group of four broadcast stations located in New York, Chicago, Detroit and Cincinnati, Mutual has expanded to a nationwide basis, having associated with it on November 1, 1941, 190 broadcast stations in the United States, Canada, Alaska and Hawaii (R. 267).[2] While this number is larger than the number of stations affiliated with each of the other networks, actually in terms of effective use as outlets for network programs, Mutual is under severe handicaps due to the restrictive provisions of contracts held by the other network companies, and in particular, the exclusive option-time provision and the network exclusivity clause. Many of Mutual's affiliates are also affiliates of National, Columbia, or the Blue Network Company, Inc., and their use by Mutual is subject to cancellation in the event of the exercise on twenty-eight days' notice of option rights by the other network companies. In a large number of important cities Mutual is effectively barred from entry on any terms as a result of Columbia's contracts with stations which prohibit them from carrying programs of another network. During and before 1941, National also had network exclusivity provisions in contracts with many of its affiliates, and the effect of such clauses, together with similar clauses in contracts between stations and Columbia, barred access by Mutual to many of the larger cities in

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[1]National Broadcasting Company, Inc. was formed in 1926 and during the time this cause was heard by the Commission, it operated two nation-wide networks, the Red and the Blue. The Blue Network Company, Inc. was formed after the commencement of this suit to operate the Blue Network (National's brief, p. 5). Columbia Broadcasting System, Inc. was formed in 1927 and operates the Columbia Network.

[2]All record references in this brief, unless otherwise indicated, apply to the record in National's case, No. 554.

which advertisers and advertising agencies desired network programs to be broadcast. However, after the inception of these proceedings by the Commission and prior to the time the cause was first heard by the three judge statutory court, National abandoned its network exclusivity clauses in its contracts with affiliates. Such abandonment occurred at the end of 1941 (R. 279; National's brief, footnote pp. 10 and 11).

Relatively few Mutual affiliates are stations of high or medium power with large coverage. Many of the stations operate with low power and have a very limited coverage. A comparison of the facilities of broadcast stations affiliated with the four national networks as of November 1, 1941, in terms of power and hours of operation is found in Mr. Weber's affidavit (R. 318-319). Whatever changes have occurred since that time do not materially alter the picture.[3]

Significance is attached by National to the fact that the stock in Mutual is owned by broadcast stations and by regional networks, behind two of which stockholders "stand the Chicago Tribune and R. H. Macy and Company, whose assets far exceed those of NBC or CBS and are not dependent upon the fortunes of network broadcasting" (National's brief, p. 14). It is further stated in National's brief (p. 14) that the responsibilities and liabilities of a network organization (like wire line costs and the obligation of furnishing a continuous schedule of sustaining programs) are not undertaken by Mutual, and that:

> "As a network organization, MBS is little more than a switchboard for the routing of the programs of its stockholders and affiliates and network programs to the stations on the MBS network" (National's brief, pp. 14 and 15).

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[3] Obviously, the facilities, number and network connections of broadcast stations change from time to time, but as these cases are here on appeal, the transcripts of record, unless otherwise indicated, provide the basis for all statements of fact.

In view of these references to Mutual's corporate organization and methods of operation, we shall devote a few words in an effort to make the matter clear.

Mutual is an Illinois corporation with its principal office in Chicago (R. 265). On December 11, 1941, it had outstanding a total of 99 shares of common stock, the only kind of stock either authorized or outstanding. Its stock is not widely distributed, and in December, 1941, it was owned by seven stockholders, each of whom owned and operated broadcast stations and two of whom operated regional networks, as follows (R. 265):[4]

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.[5]	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, Ohio.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area).

[4] Since December 11, 1941, four new stockholders have been added, each of whom owns and operates a broadcast station. The stations are located in Philadelphia, Pittsburgh, Baltimore and Buffalo. With the addition of these stockholders, the amount of stock outstanding has been increased from 99 to 142. Two of the old shareholders had their stockholdings increased from 6 to 13½; two of the new stockholders received 6 shares each and the other two received 8 shares each.

[5] Colonial Network, Inc., was not the licensee of the four stations set opposite its name. The licensee of those stations was Yankee Network, Inc., a corporation owned by the same interests.

The expenses of Mutual's operation are obtained through monies derived (1) from commissions retained out of sums received from advertisers and others for the use of time over stations affiliated with the Mutual network, together with specific contributions from shareholders and affiliates for wire line expenses, and (2) from contributions from Mutual's stockholders fixed in accordance with contracts between them and Mutual.

The two stockholders referred to in the preceding quotation from National's brief are actually WGN, Inc., the licensee of Station WGN in Chicago, and Bamberger Broadcasting Service, Inc., the licensee of Station WOR at New York. WGN, Inc. is a subsidiary of the Tribune Company. Bamberger Broadcasting Service, Inc. is a subsidiary of L. Bamberger and Company, which in turn is a subsidiary of R. H. Macy and Company. Both the Tribune Company and R. H. Macy and Company have, of course, substantial assets, although the record is silent on the subject.

National is a subsidiary of the Radio Corporation of America. The Blue Network Inc. also is a subsidiary of the Radio Corporation of America (National's brief, p. 5). The parent corporation has enormous assets, the exact figure not being shown in the record, and is engaged, either directly or through subsidiaries, in a variety of enterprises other than broadcasting. It is difficult to see how the statement in National's brief concerning the assets of the parent corporations of two of Mutual's stockholders contributes anything to a determination of the issues herein involved.

Mutual, while in form a corporation for profit, is actually a cooperative enterprise. It pays no dividends and has no profits. The status of stockholders affords them certain advantages in that stockholders have a voice in the formation of network policies and a corresponding degree of independence from arbitrary control. Financially, however, the status involves a heavy responsibility in underwriting and contributing not only the expenses of operation but, particularly in the case of the larger stockholders,

the sustaining program service, together with studio facilities, engineering staffs and other items incidental to the operation of the key stations of the network.

The mechanics involved in the operation of the Mutual Network do not differ materially in character from the mechanics involved in the operation of the other three national networks. Like its competitors, Mutual is engaged in the operation and in performing all the functions of a national network organization. Mutual supplies to its affiliates a daily network program service consisting of both commercial and sustaining programs and totaling more than 112 hours a week over a system of telephone wire lines (R. 268). Frequently, additional hours of program service are supplied, including on some occasions service throughout the 24 hours of the day for the covering of events of major importance. Thus, the network program service supplied by Mutual is substantially the same in character, content, quantity, quality, and expense of production as the network program service supplied by the other three network companies, differing only as would be naturally expected of a newer organization having a smaller volume of business and suffering from obstacles imposed upon its operation by the restrictive contracts which the Commission's regulations would prohibit.

Telephone wire lines are continuously available to Mutual for the transmission of network programs from the places of origination to the stations. The total mileage of the telephone circuits was approximately 15,000 miles in 1941 and the annual cost of leasing these wire lines was $1,200,000 (R. 268). These wire lines are, for the most part, leased directly from the Telephone Company by Mutual, but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who in turn lease the wire lines from the Telephone Company. The cost of the wire lines leased by Mutual compares favorably with those leased by the other three network companies. According

to the affidavit of Mr. Trammell, president of National (R. 235), National's wire line expenses in 1940 aggregated in excess of $3,600,000 for *two* national networks, and in the affidavit of Mr. Paley, president of Columbia (No. 555, R. 229), it is stated that Columbia's costs for wire lines amount to over $2,000,000 a year. Both of these figures, however, apparently include the cost of special, local or temporary lines, in addition to those used regularly as part of the network.

With regard to network commercial programs, like its competitors, Mutual sells time on the stations comprising its network to advertisers. Such sales are usually made through independent advertising agencies or through sales organizations maintained by Mutual's stockholders or affiliates. Because Mutual is a younger network, and, more particularly, because of the obstacles created by the restrictive contracts of the other networks, Mutual has not been able to, and does not provide, as great a volume of network programs to its affiliated stations as do its competitors, but there is otherwise no substantial difference in the commercial network service supplied by Mutual and that supplied by its competitors.

Like its competitors, most of Mutual's network commercial programs are produced and paid for by the advertising agencies. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, located chiefly in the larger cities, in the same manner as are the programs of Mutual's competitors produced by their key stations.

With regard to the network sustaining programs, like its competitors, Mutual is engaged in the business of supplying a continuous sustaining program service to all of its affiliated stations. The sustaining program service consists largely of educational, cultural, musical, news and special events programs, and such program service exceeds 84 hours weekly (R. 269). Mutual's sustaining program service differs from its competitors in that such programs are

produced not by Mutual as a separate corporation, but by its shareholders and affiliates located principally in New York, Chicago and Los Angeles, but also located in the other cities throughout the country. The sustaining program service also differs in that it is probably larger in volume because the amount of network commercial programs available to the Mutual affiliates is smaller than the number of network commercial programs broadcast by the other networks. Mutual's sustaining programs are selected by competent program personnel from all of the available programs produced by stations affiliated with the network organization.

The cost of producing such sustaining programs compares favorably with the sustaining program costs of the other national network companies (R. 270). The studios, staffs and equipment of Mutual's principal stockholders serve substantially the same purpose and perform substantially the same functions as the key stations of the other national networks. Mutual believes that the advantages of its type of program service are that (1) stations affiliated with it in all parts of the country are encouraged to produce outstanding sustaining programs in order that such programs might be broadcast nationally; (2) through the system of compensation used by Mutual, which system will be described later, funds are provided to shareholders and affiliates for this purpose instead of being retained by the network corporation; (3) a large amount of diversification of program origination points is obtained; and (4) the tendency toward the concentration of talent in the large production centers is lessened.

Unlike its competitors, Mutual as a corporation does not own or operate any broadcast stations. However, the stations operated by its stockholders, principally those in Los Angeles, Chicago and New York, and to some extent its other shareholders and a number of its affiliates, perform the same function as the key stations on the other networks. Mutual's stations in the large production centers have

comparable studio, engineering and program facilities as do the key stations of its competitors.

Mutual's method of compensation to stations on the network differs materially from the system employed by the other network companies. Mutual does not fix the rates charged advertisers for network commercial programs. Such rates are merely the sum total of the individual rates charged by all of the stations accepting and broadcasting the program. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by contract between it and the affiliate, which, in the normal case, is either large enough to include, or is supplemented by, the affiliate's share of Mutual wire line expenses, and in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward the expenses of operation. Thus, Mutual pays to its affiliates a larger proportion of the sums received from advertisers than do Mutual's competitors.

Before February 1, 1940 Mutual's contracts with its affiliates (with a few exceptions) did not contravene the Commission's regulations. However, since that date, as is set forth in the Commission's Report, Mutual executed contracts with its shareholders and with one or two of its affiliates containing network exclusivity provisions and also exclusive time options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays). These contracts are not consistent with the Commission's regulations at issue in these proceedings, but the contracts expressly provide that these clauses shall be terminated in the event the regulations become effective or in the event Mutual's competitors voluntarily abandon similar clauses, whichever occurs the sooner (R. 273).

2. The Restrictive Features in the Contracts between Mutual's Competitors and their Affiliates Effectively Stifle Competition.

The restrictive provisions in the network affiliation contracts executed by Mutual's competitors have caused and are causing Mutual irreparable injury. By reason of the limited number of broadcast stations available in cities throughout the United States, such restrictive provisions prevent Mutual from obtaining equal access to many markets and effectively bar Mutual from any access to a large number of important cities. The most important of these restrictive provisions are as follows:

1. Provisions by which the affiliate agrees not to broadcast the programs of any other network organization.[8]

2. Provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days' notice, either on all its hours of operation or on its more desirable hours in the morning, afternoon and evening periods.

3. Provisions by which the term of such contracts is fixed at a period of five years or more.

Also, the ownership by the other networks of broadcast stations in certain cities having less than four full-time stations has the same restrictive effect as the foregoing contract provisions.

The primary reason why such restrictive contracts have a stifling effect upon Mutual or any other network company which might desire to enter the business is the limited number of full-time broadcast stations available in the markets that advertisers desire to reach. As of November 1, 1941, there were 877 broadcast stations in licensed opera-

[8] As already stated, National has abandoned such exclusive provisions in its contracts with affiliates (National's brief, footnote pp. 10 and 11). However, virtually all of the contracts between Columbia and its affiliates contain network exclusivity provisions (R. 278).

tion in the United States (R. 280). Many of these stations are, however, unsuitable for network outlets due to (a) their non-commercial character; (b) restrictions on their hours of operation; (c) inadequate coverage to serve the cities in which they are located; (d) their location in towns too small to attract advertisers or (e) their locations within areas already served by four or more stations.

As of November 1, 1941, there were only approximately 21 cities adequately served by four or more full-time broadcast stations (R. 280). Of the remaining cities, approximately 24 were adequately served by three full-time broadcast stations; 59 were adequately served by two full-time broadcast stations; and, of cities having a population over 50,000, 44 were adequately served by only one full-time broadcast station. A list of cities as of November 1, 1941, classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Mr. Weber's affidavit (R. 309-317).

Many of the cities adequately served by only three full-time stations, some of the cities adequately served by only two full-time stations, and a few of the cities adequately served by only one full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of technical reasons, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

With four national networks in operation, the effect of the contract provisions above described is that in any city having less than four full-time stations, at least one of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such

city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks. A compilation as of November 1, 1941 of cities having a population of 50,000 or more in which Mutual had not access, or only a limited access, was contained in Mr. Weber's affidavit at R. 341-342.[7]

In order to have equal opportunity in securing commercial network programs for national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting of the advertisers' programs at the desired and scheduled time in such markets. Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed.

Many cities are of such importance (including a number of cities adequately served by less than four full-time stations) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually determine the choice of the advertiser. Other cities, also including a large number adequately served by less than four full-time stations from which Mutual is effectively barred equal access, are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their appeal to the particular advertiser, will determine his choice. The choice by an advertiser of one network

[7] As already indicated, from time to time changes occur in station assignments and network affiliations, as well as, in some instances, in the number of full-time stations available for network affiliation, but such changes as have occurred have not affected materially the situation.

over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies.

Specific illustrations of the loss of business by Mutual because of restrictive contracts between competitive networks and their affiliates were contained in Mr. Weber's affidavit (R. 289-298). As long as such restrictive contract provisions remain in force, it is impossible for Mutual or any new network company to compete on an equal basis with its older competitors.

3. The Regulations Adopted by the Commission are Reasonable and Will Not Destroy Network Broadcasting.

The primary regulation objected to by appellants is Regulation 3.104, which regulation prohibits the exclusive option-time provision. The nub of the present controversy revolves around this regulation.

Columbia argues that Regulation 3.101, the provision prohibiting network exclusivity clauses, is arbitrary and capricious and taken together with Regulations 3.102 and 3.104 would "destroy the network as a joint enterprise * * *" (Columbia's brief, p. 11). The answer to this argument, however, is plain. National has voluntarily abandoned the network exclusivity provision in its contracts with affiliates and no apparent injury has been caused to its network or to the network system of broadcasting.

Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network and is included in the contract only for the alleged protection of the affiliates. There is no serious argument presented that the outlawing of station exclusivity clauses is arbitrary and capricious.

Regulation 3.103 limits affiliation contracts to a period of two years, the period of time that the Commission issues

licenses to broadcast stations. This regulation prohibits networks from tying up stations for long periods of time and thus opens the door to effective competition. Obviously, the regulation is based upon sound public policy, and appellants apparently do not seriously contend that the system of network broadcasting cannot exist in the face of this regulation.

Regulation 3.105, having to do with the affiliate's right to reject network programs, is no more than a reiteration of appellants' present policies. Regulation 3.106 concerns network ownership of stations, and the regulation expressly provides that its effective date will be extended from time to time in order to permit the orderly disposition of properties.

Regulations 3.107 (having to do with the operation of two networks by one organization) and 3.108 (permitting affiliates to fix their own rates on non-network commercial programs) do not affect Columbia at all. Moreover, the effective date of Regulation 3.107 has been suspended indefinitely and will not be put in effect upon less than six months' notice. Since the proceedings in this cause were instituted, National has disposed of the Blue Network to the Blue Network Company, Inc., but it should be noted that the Blue Network Company, Inc. is also a wholly owned subsidiary of the Radio Corporation of America (National's brief, p. 5). At the present time, therefore, there is no effective separation of the two networks. The clause in affiliate contracts permitting National to fix affiliates' rates on non-network commercial programs has apparently been discontinued by National and therefore Regulation 3.108 will not have any injurious effect.[8]

Regulations 3.101 and 3.104, forbidding network exclusivity of stations and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four

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[8] Hearings before Senate Committee on Interstate and Foreign Commerce, S. Res. 113, 77th Cong., 1st Sess., p. 462.

or more full-time stations. In each such city, each of the four national networks already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station affiliated with any of the others.

No adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. The Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m. and 11 p. m. to 8 a. m.) corresponds as nearly as is practicable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining programs, and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.

Nor can there be any adverse effect upon National or Columbia from the prohibition of option-time clauses which are exclusive against other networks. The obstacles to the instantaneous transmission over wire lines of network pro-

grams to all parts of the country consist primarily in the scheduling of individual stations of *non-network* programs at various hours and in the absence of provisions for clearance of time against such programs make it necessary for the network to consult stations for clearance of the time desired for a particular network commercial program. Such obstacles are by no means insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all such obstacles.

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National nor Columbia can possibly suffer any appreciable adverse effect from the restriction under discussion. Their respective affiliates in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. As for the Blue Network Company, Inc., it may be adversely affected in that in cities served by less than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the regulations go into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, the Blue Network Company, Inc. will be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as

distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliate may be serving also as the affiliate for another network; knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Since most of the more desirable hours, particularly in the evening, are already in use over the networks of National and Columbia, in most instances the competition will be reduced to being between the Blue Network Company, Inc. and Mutual, each of which endeavors to provide the advertiser with access to the markets desired by him and in so doing offers access to the same stations in many cities adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertisers by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser (in the absence of exclusive option-time provisions in favor of the other network), but this is no more a disadvantage to one network than to the other. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

Appellants argue that if the regulations go into effect the tendency will be to create a super-network of the high-power stations throughout the country. The picture is presented

of a "super-network" of 64 stations covering the various markets that advertisers desire to reach (Affidavit of Mr. Trammell and Exhibit I attached thereto (R. 248-250)).

Appellants overlook the fact that of the 49 50 kw. clear channel stations in the United States, 21 are affiliated with National, 20 with Columbia, 6 with the Blue Network Company, Inc., and 2 with Mutual. Indeed, practically all of the 64 stations referred to by Mr. Trammell are at the present time affiliated with the Red Network of National or with Columbia's network. In most cities where one of these two networks has the better station, the affiliate of the other is so close in desirability that there is little choice between them. Thus, at the present time we have two such super-networks.

4. The Commission's Findings are Supported by the Evidence.

The court below expressly held that the findings of the Commission as announced in its Report were supported by substantial evidence, and plainly the court could come to no other conclusion. The Commission held a long and protracted hearing for approximately six months, giving National and Columbia full opportunity to present all of the evidence that they desired. After the evidence was all in, the Commission made elaborate findings to the effect that the regulations were necessary in the public interest, convenience or necessity, and these findings have an adequate and sufficient basis in the record, particularly in view of the results which the restrictive contract provisions produce. As the court below said,

> "* * * It is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case'" (R. 530).

The Commission's brief adequately summarizes the pertinent and relevant portions of the testimony and we shall not attempt to repeat such testimony here.

In *Board of Trade* v. *United States*, 314 U. S. 534, this Court readily recognized that only in exceptional cases should it interfere with the determinations of judgment made by the Interstate Commerce Commission, the expert body to which Congress has delegated the duty of administering the law. The expressions made in the opinion of this Court (per Frankfurter, J.) are so pertinent to the present controversy that they are repeated here as follows:

> "That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb nor formula nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants." (314 U. S. 548.)

CONCLUSION.

It is submitted that the Regulations of the Commission on Chain Broadcasting are not arbitrary or capricious; that the findings of the Commission are amply supported by the evidence; and that the decision of the court below should be affirmed.

Respectfully submitted,

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February 3, 1943.